Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

WELTON WRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is the Fifth Circuit's Opinion contrary to the Fourth Amendment mandate against unreasonable searches and seizures in that no warrant shall issue but upon probable cause?

II. Did the Fifth Circuit's Opinion directly conflict with the Supreme Court's decision in *Horton v. California* and is it contrary to the Fourth Amendment mandate against unreasonable searches and seizures?

III. Did the Fifth Circuit's Opinion declining to remand the case for a new trial on the issue of extrinsic influences on the jury effectively sanction a gross departure from the accepted and usual course of judicial proceedings by the lower court, denying the defendant his Sixth Amendment right to an impartial jury, such that it warrants an exercise of this Court's supervisory power?

IV. Was the Fifth Circuit's Opinion affirming the refusal by the trial court to suppress evidence seized as a result of wiretapping surveillance based on an insufficient affidavit in direct conflict with the Supreme Court's decision in Franks v. Delaware?

V. Was the Fifth Circuit's Opinion affirming the refusal by the trial court to find that the prosecutor failed to articulate clear and reasonably specific race-neutral explanations for striking certain prospective jurors and affirming the trial court's decision to sustain several "reverse *Batson*" challenges of the government in direct conflict with the Supreme Court's decision in *Batson v. Kentucky?*

QUESTIONS PRESENTED – Continued

VI. Did the Fifth Circuit err in ruling that the disparity between penalties for offenses involving cocaine base ("crack" cocaine) and cocaine hydrochloride ("powder" cocaine) are not unconstitutionally vague in violation of Petitioner's Fifth Amendment rights?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 9

I. The Fifth Circuit's Opinion is contrary to the Fourth Amendment mandate against unreasonable searches and seizures and that no warrant shall issue but upon probable cause 9

II. The Fifth Circuit's Opinion directly conflicts with the Supreme Court's decision in *Horton v. California* and is contrary to the Fourth Amendment mandate against unreasonable searches and seizures 11

III. The Fifth Circuit's Opinion declining to remand the case for a new trial on the issue of extrinsic influences on the jury effectively sanctioned a gross departure from the accepted and usual course of judicial proceedings by the lower court, denying the defendant his Sixth Amendment right to an impartial jury, and warrants an exercise of this Court's supervisory power 12

TABLE OF CONTENTS – Continued

Page

IV. The Fifth Circuit's Opinion affirming the refusal by the trial court to suppress evidence seized as the result of wiretapping surveillance based on an insufficient affidavit was in direct conflict with the Supreme Court's decision in *Franks v. Delaware* 15

V. The Fifth Circuit's Opinion affirming the refusal by the trial court to find the prosecutor failed to articulate clear and reasonably specific race-neutral explanations for striking certain prospective jurors and affirming the trial court's decision to sustain several "reverse *Batson*" challenges of the government was in direct conflict with the Supreme Court's decision in *Batson v. Kentucky* 18

VI. Did the Fifth Circuit err in ruling that the disparity between penalties for offenses involving cocaine base ("crack" cocaine) and cocaine hydrochloride ("powder" cocaine) are not unconstitutionally vague in violation of Petitioner's Fifth Amendment rights? 23

CONCLUSION 24

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) 18, 19, 20, 22

Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.E.2d 667 (1978) 15, 16

Horton v. California, 110 S.Ct. 2301 (1990) 11, 12

Illinois v. Gates, 462 U.S. 213 (1983) 10

Llewellyn v. Stynchcombe, 609 F.2d 194 (5th Cir. 1980) 14

Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) 19

Solan v. United States, 414 F.2d 714 (9th Cir. 1969) 15

United States v. Clemons, 941 F.2d 321 (5th Cir. 1991) 18

United States v. Fike, 82 F.3d 1315 (5th Cir.), cert. denied, ___ U.S. ___, 117 S.Ct. 242, 136 L.Ed.2d 170 (1996) 19

United States v. Forbes, 816 F.2d 1006 (5th Cir. 1987) 18

United States v. Guerra-Marez, 928 F.2d 665 (5th Cir. 1991) 16

United States v. Howard, 506 F.2d 865 (5th Cir. 1975) 13

United States v. Jerry Jones, 864 F.Supp. 1303 (D.C. N.D. Ga. 1994) 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Krout, 66 F.3d 1420 (5th Cir. 1995), cert. denied, ___U.S. ___, 116 S.Ct. 963, 133 L.Ed.2d 884 (1996) 19

United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) 9, 10, 11

United States v. Luffred, 911 F.2d 1011 (5th Cir. 1990) 14

United States v. O'Keefe, 722 F.2d 1175 (5th Cir. 1983) 13

United States v. Ortiz, 942 F.2d 903 (5th Cir. 1991), cert. denied, 504 U.S. 985, 112 S.Ct. 2966, 119 L.Ed.2d 587 (1992) 14

United States v. Richardson, 943 F.2d 547 (5th Cir. 1991) 11

United States v. Ruggiero, 56 F.3d 647 (5th Cir. 1995) 13, 14

United States v. Sanchez-Sotelo, 8 F.3d 202 (5th Cir. 1993), cert. denied, 511 U.S. 1023, 114 S.Ct. 1410, 128 L.Ed.2d 82 (1994) 13, 14

United States v. Wallace, 32 F.3d 921 (5th Cir. 1994) 18

United States v. Winkle, 587 F.2d 705 (5th Cir.), cert. denied, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979) 13, 14

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

4th Amendment, United States Constitution ... 1, 9, 10, 11

5th Amendment, United States Constitution ... 2, 23, 24

6th Amendment, United States Constitution ... 2, 12, 14

18 U.S.C. § 2518(1)(c) 4, 16

TABLE OF AUTHORITIES – Continued

Page

21 U.S.C. § 841(a)(1) 2, 5

21 U.S.C § 841(b)(ii) 3

21 U.S.C. § 841(b)(iii) 3

21 U.S.C. § 846 ..... 2, 5

28 U.S.C. § 1254(1) 1, 4

28 U.S.C. § 1331 ..... 5, 8

PETITION FOR WRIT OF CERTIORARI

Welton L. Wright ("Wright") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit on April 29, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, is reported in 140 F.3d 596. It is printed in Appendix A hereto ("App. A") at page App. 1.

JURISDICTION

The Ruling of the United States Court of Appeals, Fifth Circuit, was entered on April 29, 1998. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject, for the same offence to be twice put in jeopardy for life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property; without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Sixth Amendment, United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

4. The statutes under which Petitioner was prosecuted, though nothing turns on its terms, were 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846, which provide as follows:

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or process with intent to manufacture, distribute, or dispense, a controlled substance; . . .

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

5. 21 U.S.C. § 841(b)(ii) & (iii), which provides:

. . .

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows: . . .

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of – (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine of their salts have been removed; (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; (III) ecgonine, its derivatives, their salts, isomers, and salts

of isomers; or (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contain cocaine base; . . .

6. The statute under which the United States Supreme Court has jurisdiction is 28 U.S.C. § 1254(1) which provides as follows:

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

7. 18 U.S.C. Section 2518(1)(c), which provides:

(1) Each application for an order authorizing or approving the interception of a wire oral communication under this chapter shall be made in writing upon oath or affirmation of a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . .

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or

> why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
>
> . . .

8. 28 U.S.C. § 1331, which provides:

> The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATEMENT OF THE CASE

On September 4, 1996, in a cause then pending in the United States District Court for the Western District of Louisiana entitled United States of America versus Victor G. Kelley; Welton L. Wright; Terry Elmore; James Earl Shaw; Parnell Kelley aka P.K., Petitioner was found guilty by a jury on an indictment of one count of conspiracy to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846 and four counts of distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1). On December 16, 1996 Petitioner was sentenced to be imprisoned for a total term of 324 months on the one count of conspiracy to distribute cocaine base and three counts of distribution of cocaine base and 240 months on one count of distribution of cocaine base, the terms to run concurrently. The United States Court of Appeals for the Fifth Circuit affirmed the decision of the District Court on April 29, 1998.

The relevant facts are as follows:

In approximately May, 1994, the government began work attempting to develop a case against Welton Wright ("Wright") and other co-defendants in an alleged drug ring with the use of a confidential informant by the name of Daniel Mario Townes ("Townes"). Townes allegedly approached state police with some drugs that had been "fronted" him by Petitioner. Townes at the time of his alleged "conversion" had become a suspect in an unrelated robbery and drug case. Townes, in spite of his extensive prior criminal history, became a paid informant for the government. An undercover agent of the Louisiana State Police, Tamara Andrews ("Andrews"), teamed up with Townes and set up several alleged drug deals with Wright and several of the co-defendants. Both Townes and Andrews were wired with eavesdropping devices during these transactions. The government also wiretapped Wright's telephone for a one month period in 1994 and intercepted numerous drug related phone calls.

The government's presentation at trial consisted principally of the following: (1) The testimony of Townes pertaining to his concededly "limited" penetration of the alleged drug ring; (2) The testimony of Townes and Andrews pertaining to (and wiretapping and eavesdropping surveillance evidence gathered from) the alleged drug distribution transaction; (3) Surveillance evidence secured via a wiretap of Wright's home telephone; and (4) Certain evidence (i.e., cash and a page from a notebook reported to be a drug ledger) seized from one of the co-defendant's home pursuant to an unsigned and undated warrant.

Petitioner and the other co-defendants sought suppression of the wiretapping evidence and the drug ledger page on the grounds that the government's affidavit in support of the wiretap was deficient and the warrant authorizing the search of the co-defendant's home was invalid. Both motions were ultimately denied. As to the drug ledger, the magistrate judge initially suppressed it because it's seizure exceeded the scope of the warrant. The district court disagreed with the magistrate judge's reasoning, finding that seizure of the drug ledger did not exceed the scope of the warrant because it appeared in plain view among the documents and papers that were authorized to be searched. Nevertheless, the district court initially decided to suppress the ledger because the warrant was unsigned and undated. After considering the government's motion to reconsider, however, the district court determined that the good faith exception to the exclusionary rule was applicable, and allowed the drug ledger page into evidence.

During jury selection at trial, defendants used their fourteen peremptory strikes to strike various jurors. The government challenged defendants' strikes as racially motivated. The defendants also challenged the government's use of six of its ten strikes to strike African-Americans. Three African-Americans remained on the jury. All of the defendants, including Petitioner, are African-Americans. The district judge found that both the government and the defendants had made a prima facie showing of racially motivated peremptory strikes and required that both sides proffer reasons for their strikes. The court disbelieved defendants with respect to the motivation of four of their strikes and three of those

jurors survived on the jury. The court accepted all of the government's reasons as race neutral and valid.

During the course of jury deliberations, the jury sent a note to the trial judge that "some members of the jury are afraid for the safety of their families, and their own safety as well, and will not vote on any count of the indictment for or against." (App. 50). After some discussion between the court and counsel, all defendants, including Petitioner, joined in a motion for mistrial. The trial court denied the motion for mistrial and read to the jury a rather lengthy cautionary instruction, resembling an Allen charge. Shortly thereafter, the jury returned a verdict of guilty for all defendants on all counts.

Subsequently the sentencing court accepted the probation department's calculation that 2,177.65 grams of cocaine base were involved in the offenses. Of this amount only 206.32 grams were documented by means other than the testimony of the government's chief confidential informant, Daniel Mario Townes. However, the district court used the 2,177.65 gram calculation as the quantity of drugs involved in the offense for the purpose of calculating the base offense level under the sentencing guidelines. In addition, Wright was sentenced based upon a conviction involving crack cocaine when a sentence imposed for similar quantities of powder cocaine would have been considerably less.

Existence of Jurisdiction Below

Petitioner was convicted in the United States District Court for the Western District of Louisiana, exercising jurisdiction pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion is contrary to the Fourth Amendment mandate against unreasonable searches and seizures and that no warrant shall issue but upon probable cause.

It is Defendant's contention that no valid warrant issued in this case. The district court failed to suppress evidence found during a search of the residence of co-defendant, Victor Kelley. A notebook, the last page of which was purported to be a "drug ledger", was found in a night stand in the bedroom of defendant Kelley. The warrant allegedly issued was not signed or dated by the magistrate judge.

After an evidentiary hearing the magistrate judge recommended that the notebook be suppressed, finding that the seizure of the notebook exceeded the scope of the warrant. The district court subsequently agreed on the suppression but on the basis that the warrant was not signed or dated by the magistrate judge. A motion to reconsider was filed by the prosecution and the district court reversed its ruling, thus denying the motion to suppress.

Citing *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the Fifth Circuit in the case at bar opined that the good-faith exception to the exclusionary rule applied and found that the warrant was valid. However, the good-faith exception to the exclusionary rule announced in *Leon* does not specifically address the issue of the constitutional requirement that "no Warrants shall issue, but upon probable cause." *Fourth Amendment, United States Constitution.*

> Whether the exclusionary sanction is appropriately imposed in a particular case, our decisions make clear, is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct'.

Leon, supra at 906, (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)). "In so limiting the suppression remedy, we leave untouched the probable-cause standard and the various requirements for a valid warrant." *Leon, supra* at 923. Thus the Fifth Circuit apparently did not squarely address the issue of whether the Fourth Amendment was violated in the case at bar.

There are indeed certain minimal requirements for a warrant to be found valid and issued upon probable cause. Clearly, the document purporting to be a search warrant was not signed by the magistrate judge nor did it contain a date. It was nothing more than a xerox or photostatic copy of a document or writing generated by a law enforcement agency. The document in question was just a blank copy of a warrant. It has no legal efficacy and is therefore not a warrant. It would be incongruous to hold that once the incriminating evidence is found the magistrate can then sign the warrant and cure the alleged "technical" defect. The magistrate in a particular case could then be, perhaps subconsciously, tainted by the discovered evidence (illegally obtained because of the defective warrant) and thereby persuaded that indeed there was probable cause. This would have the effect of completely obviating the requirement of submission to a neutral magistrate in the first instance. It would also be

an outcome-oriented result and would strike at the very heart of the Fourth Amendment.

In an effort to address Defendant Wright's allegations regarding suppression apart from the exclusionary rule but as a direct violation of the Fourth Amendment, the Fifth Circuit cites *United States v. Richardson*, 943 F.2d 547 (5th Cir. 1991). This reference is inapposite insofar as *Richardson* in turn cites *Leon* which as stated above was the seminal case holding that the good-faith exception indeed should apply to the exclusionary rule. In sum, the Fifth Circuit attempts to address Defendant Wright's non-exclusionary rule arguments by citing cases which revolve around the exclusionary rule, i.e., *Leon* and *Richardson*.

II. The Fifth Circuit's Opinion directly conflicts with the Supreme Court's decision in *Horton v. California* and is contrary to the Fourth Amendment mandate against unreasonable searches and seizures.

The initial investigation in the case at bar was on a money laundering count. The purported warrant issued in this case authorized the seizure of four (4) categories of items. "The notebook page in question is clearly not includable within the descriptions in items 2, 3 or 4 in the list of property to be seized." *Report and Recommendation of Magistrate Judge*, App. 40. Item 1 reads as follows: "Any and all books, records, notes, receipts, etc. relating to the acquisition of assets and disbursements of currency with laundered funds." *Report and Recommendation of Magistrate Judge*, App. 40. The notebook page seized allegedly relates to the purchase or sale of drugs by defendants.

Clearly, the purchase and sale of drugs cannot reasonably be held to relate "to the acquisition of assets and disbursements of currency with laundered funds."

Horton v. California, 110 S.Ct. 2301 (1990) held that law enforcement authorities executing a valid search warrant may seize items outside the scope of the warrant if the items are in plain view, the incriminating character of the items is "immediately apparent" and seizure of the items is justified because "exigent" circumstances exist. Clearly, a notebook which, at first glance contained the irrelevant markings of a child cannot be considered to have incriminating evidence that is "immediately apparent". The notebook had to be searched itself, for its incriminating character to become evident. Further, Special Agent Swanner, an IRS agent, did not have the expertise necessary for him to determine that it was "immediately apparent" that the notebook was a drug ledger. For these reasons, as well as the lack of signature on the warrant, this evidence should have been suppressed and failure to do so by the trial court was clear error.

III. The Fifth Circuit's Opinion declining to remand the case for a new trial on the issue of extrinsic influences on the jury effectively sanctioned a gross departure from the accepted and usual course of judicial proceedings by the lower court, denying the defendant his Sixth Amendment right to an impartial jury, and warrants an exercise of this Court's supervisory power.

During the course of jury deliberations, the jury sent a note to the trial judge that "some members of the jury

are afraid for the safety of their families, and their own safety as well, and will not vote on any count of the indictment for or against." *Jury Note*, App. 50. A motion for mistrial was made by all defendants at that time. The motion was denied and the trial court read to the jury a rather lengthy cautionary instruction, resembling an Allen charge. Shortly thereafter, the jury returned a verdict of guilty for all defendants on all counts.

The Fifth Circuit has provided the following analysis to address jury misconduct involving extrinsic evidence in *United States v. Ruggiero*, 56 F.3d 647 (5th Cir. 1995):

> We often have stated that '[i]n any trial there is initially a presumption of jury impartiality.' *United States v. O'Keefe*, 722 F.2d 1175, 1179 (5th Cir.1983); accord *United States v. Winkle*, 587 F.2d 705, 714 (5th Cir.), cert. denied, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979). This presumption, however, may be attacked, and '[p]rejudice may be shown by evidence that extrinsic factual matter tainted the jury's deliberations.' *O'Keefe*, 722 F.2d at 1179; accord *Winkle*, 587 F.2d at 714; *United States v. Howard*, 506 F.2d 865 (5th Cir.1975).
>
> When 'a colorable showing of extrinsic influence appears, a court must investigate the asserted impropriety.' *Winkle*, 587 F.2d at 714; accord *United States v. Sanchez-Sotelo*, 8 F.3d 202, 212 (5th Cir.1993), cert. denied, 511 U.S. 1023, 114 S.Ct. 1410, 128 L.Ed.2d 82 (1994). Further, it is well-settled that 'a defendant is entitled to a new trial when extrinsic evidence is introduced into the jury room "unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." '

> *United States v. Luffred*, 911 F.2d 1011, 1014 (5th Cir.1990) (quoting *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir.1980)); accord *Sanchez-Sotelo*, 8 F.3d at 212; *United States v. Ortiz*, 942 F.2d 903, 913 (5th Cir.1991), cert. denied, 504 U.S. 985, 112 S.Ct. 2966, 119 L.Ed.2d 587 (1992); *Winkle*, 587 F.2d at 714. This rule creates a rebuttable presumption of prejudice to the defendant, and 'the government has the burden of proving the harmlessness of the breach.' *Luffred*, 911 F.2d at 1014.

In the instant case, it is not readily ascertainable from the record whether extrinsic evidence came to bear on creating the jury's fear. However, it is readily apparent that a factor outside of the elicited evidence, fear itself, was having a bearing on the jury deliberations. Consequently, the analysis articulated in *Ruggiero* should still be applicable as that fear is itself extrinsic from the actual evidence. Such an analysis would result in the proper verdict of mistrial in this case. As the Court in *Ruggiero* pointed out, when a colorable showing of extrinsic influence appears the court must investigate the asserted impropriety. *Winkle*. In the case at bar the court did not investigate the asserted impropriety, and it was clear error not to do so.

It is clear in the federal jurisprudence the trial court **must** investigate the asserted impropriety. The court below failed to do so and because of this failure it will not be known whether this extrinsic influence had a material effect on the jury's deliberations. This failure on the part of the trial court effectively denies the defendant his right to an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution. To hold that such

a failure on the part of a trial court is not a violation of the defendant's constitutional rights is tantamount to encouraging the lower court to turn a blind eye toward extrinsic influences (by not investigating) and to do so with apparent impunity. The defendant could never meet his burden of a "colorable showing", thus rendering the requirement, as set forth in the cases, utterly useless. Such a result surely was not intended by the various authors of the above-cited cases regarding extrinsic evidence and jury impartiality.

Additionally, it was inappropriate for the trial court to administer the modified Allen charge that was given to the jury, as it only caused to amplify the jury's fear. *Solan v. United States*, 414 F.2d 714, 716 (9th Cir. 1969) instructs that the Allen instruction "certainly should be given only when it is apparent to the district judge from the jury's conduct or length of its deliberations that it is clearly warranted." In the case at bar the jury had been out only a short time in deliberation when the instruction was given.

IV. The Fifth Circuit's Opinion affirming the refusal by the trial court to suppress evidence seized as the result of wiretapping surveillance based on an insufficient affidavit was in direct conflict with the Supreme Court's decision in *Franks v. Delaware*.

Following a pretrial hearing to suppress the evidence, the trial court followed the decision of the magistrate judge denying the motion to suppress. However, intercepting or bugging the telephones of citizens of the United States is one of the most egregious invasions of privacy one can suffer at the hands of the government.

For this reason, and many others, the procedures required for authorizing wiretapping, or bugging, should be very strictly adhered to and the provisions strictly construed. The procedures required are established in 18 U.S.C. Section 2518, which at Section 2518(1)(c) provides in pertinent part:

> (1) each application for an order authorizing or approving the interception of a wire oral communication under this chapter shall be made in writing upon oath or affirmation of a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information: (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear unlikely to succeed if tried or to be too dangerous.

United States v. Guerra-Marez, 928 F.2d 665 (5th Cir. 1991) emphasized that the factual allegations in the affidavit supporting the finding of probable cause must be truthful. If there is a showing of a false statement, either knowingly or intentionally, or with reckless disregard for the truth, the offensive language contained in the affidavit must be excised and the affidavit reevaluated for probable cause without that language. *Guerra-Marez*, relying on *Franks v. Delaware*, 438 U.S. 154, 164, 98 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (1978). In the instant case, the affidavit used to support the wiretap application, as prepared by FBI Special Agent John Tanza, was admitted into evidence as government Exhibit "1". In the affidavit, Tanza makes the rote allegation that he has exhausted

other investigative techniques. He makes unsubstantiated allegations or conclusions that physical surveillance would be insufficient to establish the facts necessary to prove the case and would result in alerting defendants to the investigation. No interstate stops were used, or tailing, in spite of the information that this was such a pervasive ring involving "between 13 and 15 kilograms of cocaine per month" involving "female couriers, the use of interstate bus lines, various types of transport vehicles and commercial airlines." If these allegations as contained in the affidavit are not merely speculation or suspicious, why were the female couriers, the bus lines, the various vehicles, and the airlines not surveilled and, where appropriate, stopped. In addition to this obvious misrepresentation in the affidavit, Agent Tanza also alleges that the confidential informant existed only on the "fringe" of this purported drug operation. However, as was thoroughly developed at trial, the confidential informant was a significant part of many of the counts in the indictment.

The other allegations of a conspiracy heavily rely on the assertions of a completely unreliable and uncorroborated confidential informant. Because of the grave and invasive nature of a wiretap, the government must be held to a higher standard of truthfulness and accuracy in its affidavit in support of the wiretap. Because of the defects contained therein, all evidence obtained as a result of the wiretap should have been suppressed.

V. The Fifth Circuit's Opinion affirming the refusal by the trial court to find the prosecutor failed to articulate clear and reasonably specific race-neutral explanations for striking certain prospective jurors and affirming the trial court's decision to sustain several "reverse *Batson*" challenges of the government was in direct conflict with the Supreme Court's decision in *Batson v. Kentucky*.

A prosecutor violates the Equal Protection Clause when potential jurors are challenged solely on the basis of their race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986); see *United States v. Clemons*, 941 F.2d 321, 323 (5th Cir.1991). The process for examining an objection to peremptory challenges under *Batson* is as follows:

> (1) a defendant must make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Clemons, 941 F.2d at 324. When the record contains an explanation for the Government's peremptory challenges, this court will review "only the propriety of the ultimate finding of discrimination vel non." *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir.1987). Jury selection is subjective, and a *Batson* determination turns largely on the court's evaluation of the credibility of counsel's explanation. *United States v. Wallace*, 32 F.3d 921, 925 (5th Cir.1994). The district court's decision on the ultimate question of discriminatory intent is a finding of fact

which is accorded great deference. *United States v. Fike*, 82 F.3d 1315, 1319 (5th Cir.), cert. denied, ___ U.S. ___, 117 S.Ct. 242, 136 L.Ed.2d 170 (1996). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral." *Purkett v. Elem*, 514 U.S. 765, ___, 115 S.Ct. 1769, 1775, 131 L.Ed.2d 834 (1995); *United States v. Krout*, 66 F.3d 1420, 1429 (5th Cir.1995), cert. denied, ___ U.S. ___, 116 S.Ct. 963, 133 L.Ed.2d 884 (1996).

The trial judge correctly made a determination that the defendants had made a prima facie showing that the prosecutor exercised her peremptory challenges on the basis of race. All seven (7) defendants were black and six (6) of the ten (10) peremptory strikes by the prosecution were African-American venire persons. Once this prima facie showing was made, the burden then shifted to the prosecution to show that its challenges were not racially motivated. Wright contends that in four (4) of the six (6) contested challenges the prosecutor failed to articulate clear and reasonably specific race-neutral explanations, specifically for jurors number seven (7), twenty-one (21), thirty-three (33), and twenty (20).

Following each defense *Batson* challenge, the court asked the prosecutor to state her reason for striking the prospective juror. For juror number seven (7) the prosecution responded:

> Both Mr. Elmer and myself noticed that when you were speaking with the other jurors Ms. Jones was glaring at us. And I would say that sixty percent of the time she was staring at both Mr. Ellender and myself. And she was trying to

> read Mr. Elmer's notes. She never cracked a smile was serious.

For juror number twenty-two (22) the prosecutor stated:

> She stated on her jury questionnaire, I don't think we brought her back, that she had a nervous condition. Mr. Smith and myself also observed her holding her head during a large part, like she was in some type of pain during the questioning. She worked for an alternative school with children who are disadvantaged, special education class. . . . She was on the back row, and I believe the last juror. And she appeared to be in pain. And she constantly had her forehead in her hand and bent over.

For juror number thirty-three (33) the prosecutor stated:

> The reason that we struck her, her husband is unemployed. And she has only been employed at Wal-Mart for the last six months.

For juror number twenty (20) the prosecutor stated:

> Number Twenty, Tonya Kelly. Again, we should have called her back. We need, in this case that the witnesses and the defendants on occasions spelled the Kelley name K-E-L-L-Y. She is also a young mother. She's not self-supporting. She lives with her parents.

In all four responses by the prosecutor, she failed to articulate a legitimate clear and reasonable race-neutral reason for these strikes. The most egregious of these errors is with juror number thirty-three (33). The fact that this juror's husband is unemployed and she works for Wal-Mart is not, even remotely, a reasonable racially neutral explanation for a strike. Juror number thirty-three

(33), Monica Echols, who is African-American like all of the defendants in this case, was individually questioned during voir dire. She did express some initial concern that she would financially suffer from having to serve on the jury because she worked 40 hours per week at Wal-Mart. However, after it was pointed out to her that she would be paid $40 per day plus mileage to serve on the jury, she was satisfied that this would take care of any financial concerns she might have. No challenges for cause were lodged and the court appeared satisfied that Ms. Echols would be a competent juror. It is obvious that the prosecution's reason for striking this juror was a poorly veiled effort to exclude an African-American from a jury supposedly of defendant's peers.

Juror number twenty (20), Tonya Kelly, is a young mother who lives with her parents who simply had a last name similar to defendants. This juror did not express that she was related to defendant or even knew him. The prosecution did not request that she be individually questioned when asked. The reason given here is another thinly veiled effort to exclude an African-American from the jury. The reasons given to exclude jurors seven (7) and twenty-two (22) were similarly insufficient to survive a *Batson* challenge.

The blatant and transparent racially motivated strikes, particularly jurors number thirty-three (33), Monica Echols, and number twenty (20), Tonya Kelley, clearly demonstrates that all six (6) of the black jurors struck by the government were racially motivated. Even though on a couple of them the government articulated an apparent racially neutral explanation for the strike, a dark cloud of

discrimination now hangs over the government's intent when striking all six (6) black jurors.

When analyzed individually and collectively, the prosecutor failed to articulate a legitimate, clear and reasonable race-neutral reason for these strikes causing reversible error.

The trial court also erred by sustaining four (4) reverse *Batson* challenges by the prosecution for jurors number twelve (12), fourteen (14), fifty-nine (59), and a juror named Tina Powell. A review of the peremptory challenges made by the defendants, which the trial court overruled, shows that the defendants articulated legitimate, clear and reasonable explanations to strike these jurors. When compared with those reasons articulated by the prosecution for sustaining the prosecution's peremptory challenges, there appears to be little distinction shown. In response to the court's determination as to why juror number twelve (12) struck, counsel for defendant, Welton Wright, articulated that he was not satisfied with juror's demeanor in response to questioning. This explanation was sufficiently race-neutral. How is this response any less race-neutral than the prosecution stating that someone glared at them? Defendant's response to the other three (3) challenges was also sufficiently race-neutral and the reverse *Batson* challenges should not have been sustained.

VI. Did the Fifth Circuit err in ruling that the disparity between penalties for offenses involving cocaine base ("crack" cocaine) and cocaine hydrochloride ("powder" cocaine) are not unconstitutionally vague in violation of Petitioner's Fifth Amendment rights?

Welton Wright was sentenced to twenty-seven (27) years incarceration for his conspiracy conviction involving crack cocaine. When compared to sentences imposed for similar quantities of powder cocaine, this sentence is grossly excessive. The current sentencing scheme for cocaine violations sets forth two different penalties for identical conduct, that is, the sale of cocaine. Under the rule of leniency, the lesser penalty for cocaine rather than the higher one for cocaine base, as set out in the original statute, should be applied.

In a recent decision which addressed the disparity between cocaine penalties, the *Jones* Court stated:

> [T]he court must conclude based on the evidence before it that cocaine base is a term synonymous with cocaine, that as a result the penalty provisions of § 841 set out a scientifically meaningless distinction between cocaine and cocaine base, and that the heightened penalty provision of cocaine base must be ignored by operation of the rule of leniency.

United States v. Jerry Jones, 864 F.Supp. 1303, 1309 (D.C. N.D. Ga. 1994) (unanimous agreement among all experts that "cocaine base" is synonymous with "cocaine"). Thus, all forms of cocaine are covered by both 21 U.S.C.

§ 841(b)(ii) and (iii). Where there are two different penalties for the exact same conduct, the rule of leniency should prevail, and the lesser punishment be imposed.

The Fifth Circuit has rejected this argument. Accordingly, the distinction between cocaine base and powder cocaine is ambiguous and unconstitutionally vague for sentencing purposes in violation of Amendment V of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, and because there were numerous and pervasive defects in the proceedings at the trial level resulting in serious violations of the defendant's constitutional rights, the Petitioner, **WELTON WRIGHT**, respectfully prays that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-30056

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VICTOR G. KELLEY; WELTON L. WRIGHT; TERRY ELMORE; JAMES EARL SHAW; PARNELL KELLEY aka P.K.,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Louisiana

(Filed Apr. 29, 1998)

Before REYNALDO G. GARZA, DUHÉ and STEWART, Circuit Judges.

STEWART, Circuit Judge:

On September 28, 1995, Victor G. Kelley, Welton L. Wright, Terry Elmore, James Earl Shaw, Larry Doublin, and Parnell Kelley, aka P.K., were arrested pursuant to a 13-count indictment alleging a drug conspiracy, forfeiture, and various drug distribution crimes that spanned from sometime in 1993 through May 1995. The distribution charges against Victor Kelley, the purported leader of

the conspiracy, were dropped prior to trial. Victor Kelley's girlfriend – Angela Turner – was also named in the indictment, but her charge was limited to a structuring offense. Following a three-week jury trial, the defendants were found guilty on all counts of the indictment and convicted as charged. Victor Kelley, Welton Wright, Terry Elmore, James Shaw, and Parnell Kelley timely appeal such convictions and sentences.

Factual Background and Procedural History

The appellants, each in their twenties (except Wright), all resided in Monroe, Louisiana, and apparently grew up in the same neighborhood or have known each other for quite some time. All of the appellants – and all of the defendants below – are African-American. The government alleges that they orchestrated a rather large, almost impenetrable drug distribution ring in northeast Louisiana – its leader being Victor Kelley, its supervisor being Wright, and its "headquarters" being Wright's home as that is where appellants' often gathered to cook the powder cocaine into crack cocaine. The government asserts that the cocaine was imported by Victor Kelley from Houston, Las Vegas, and California.

The charges stem from transactions entered into between various appellants and Daniel Townes, a confidential informant ("CI"), and Tamara Andrews, an undercover agent ("UCA") who posed as Townes' girlfriend. Townes, an unindicted co-conspirator in this action, reported that he had previously been involved in selling drugs with these men and subsequently was used to provide investigators access to the organization. Both

Townes and Andrews were wired with eavesdropping devices during these transactions. The government also wiretapped Wright's telephone for a one-month period in 1994 and intercepted numerous drug-related phone calls.

During the course of the investigation, officers became aware that Angela Turner had purchased the property in which she resided with Victor Kelley and two of his children with $60,000 in bank money orders which she had obtained with the names of various individuals on them. Investigators obtained a search warrant for the home in order to seize bank records and/or financial documents related to the purchase. During the search, officers found a notebook appearing to be a drug ledger which they seized. That seizure, conducted pursuant to an unsigned search warrant, was the subject of one of the defendants' motions to suppress.

The government's presentation at trial consisted principally of the following: (1) the testimony of CI Townes pertaining to his concededly "limited" penetration of the drug ring; (2) the testimony of CI Townes and UCA Andrews pertaining to (and wiretap and eavesdropping surveillance evidence gathered from) the drug distribution transactions;[1] (3) surveillance evidence secured via a wiretap of Wright's home telephone;[2] and (4) certain

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[1] These transactions occurred over a period from the end of June, 1994 through the end of October, 1994. In early October, one of Wright's associates recognized Andrews as an undercover agent. All subsequent attempts to engage appellants in drug transactions (except one by Townes alone) were unsuccessful.

[2] The wiretap was effective from November 7, 1994 to December 7, 1994.

evidence (*i.e.*, cash and a page from a notebook purported to be a drug ledger) seized from Victor Kelley's and Turner's home pursuant to an unsigned and undated warrant.

In response, appellants sought suppression of the wiretap evidence and the drug ledger page, on the grounds that the government's affidavit in support of the wiretap was deficient and the warrant authorizing the search of Kelley's home was invalid. Both motions were ultimately denied. As to the drug ledger, the magistrate judge initially suppressed it because its seizure exceeded the scope of the warrant. The district court disagreed with the magistrate judge's reasoning, finding that seizure of the drug ledger did not exceed the scope of the warrant because it appeared in plain view among the documents and papers that were authorized to be searched. Nevertheless, the district court initially decided to suppress the ledger because the warrant was unsigned and undated. After considering the government's motion to reconsider, however, the district court determined that the good-faith exception to the exclusionary rule was applicable, and allowed the drug ledger page into evidence.

During jury selection at trial, defendants used their fourteen peremptory strikes to strike only white jurors. The government challenged defendants' strikes as racially motivated. The defendants then challenged the government's use of six of its ten strikes to strike African-Americans. Three African-Americans remained on the jury. The district judge found that both the government and the defendants had made a prima facie showing of racially-motivated peremptory strikes and required that

both sides proffer reasons for their strikes. The court disbelieved defendants with respect to the motivation for four of their strikes and three of those jurors survived on the jury. The court accepted all of the government's reasons as race-neutral and valid.

Following the trial, Victor Kelley was convicted of conspiracy to distribute crack cocaine. All other defendants were convicted as charged. The district court sentenced the defendants based on guideline calculations using the entire amount of drugs testified to at trial as the amount distributed by the entire conspiracy. The defendants timely appeal their convictions.

ANALYSIS

I

The Unsigned and Undated Search Warrant

Standard of Review

When reviewing the denial of a motion to suppress, we review factual findings for clear error and review the trial court's ultimate conclusion as to the constitutionality of law enforcement action de novo. *United States v. Castro*, 129 F.3d 752, 755 (5th Cir. 1997). Conclusions of law regarding the sufficiency of a warrant are reviewed de novo. *United States v. Shugart*, 117 F.3d 838, 843 (5th Cir. 1997). Likewise, the district court's determination of the reasonableness of a law enforcement officer's reliance upon a warrant issued by a magistrate – for purposes of determining the applicability of the good-faith exception to the exclusionary rule – is also reviewed de novo.

United States v. Satterwhite, 980 F.2d 317, 320 (5th Cir. 1992).

Discussion

Victor Kelley and Welton Wright argue that the district court erred in failing to suppress evidence found during the search of Victor Kelley and Angela Turner's premises because the warrant used to authorize the search was not signed or dated by the issuing magistrate judge. The appellants contend that the magistrate's failure to sign the search warrant was critical to the validity of the warrant and that no search pursuant to such a warrant could be a good-faith search. The appellants maintain that the district court erred in denying their motion to suppress the drug ledger and that the good-faith exception to the exclusionary rule should not be applicable to this case.[3] They further argue that the items

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[3] We note that ordinarily, Wright would lack the requisite standing to bring this claim. Ordinarily, there is no standing to contest a search and seizure when the defendant is not on the premises at the time of the contested search and seizure; he alleges no proprietary or possessory interest in the premises; and he is not charged with an offense that includes as an essential element thereof the possession of seized evidence at the time of the contested search and seizure. *Brown v. United States*, 411 U.S. 223, 229 (1973); *see also United States v. Krout*, 66 F.3d 1420, 1430-31 (5th Cir. 1995) ("In general, a person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."). Nonetheless, by failing to contest this issue either before the district court or this panel, the government has waived its standing argument with respect

seized – in particular, a drug ledger page – exceeded the scope of the purported warrant. In its motion to reconsider filed in the district court, the government urged the court to apply the good-faith exception to the exclusionary rule. The government submitted three affidavits in support of the executing officers' reasonable presumption of the warrant's validity.[4]

The Fourth Amendment's exclusionary rule does not bar the admission of evidence obtained with a warrant later found to be invalid so long as the executing officers acted in reasonable reliance on the warrant. *United States v. Leon*, 468 U.S. 897, 906-08, 104 S.Ct. 3405, 3411-12, 82 L.Ed.2d 677 (1984). Generally, "[i]ssuance of a warrant by a magistrate suffices to establish good faith on the part of law enforcement officers who conduct a search pursuant

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to Wright. *See United States v. Cardona*, 955 F.2d 976, 981 (5th Cir. 1992) (citing *Steagald v. United States*, 451 U.S. 204, 208-11, 101 S.Ct. 1642, 1645-47, 68 L.Ed.2d 38 (1981)).

[4] The affidavits are taken from I.R.S. Special Agent Kenneth Swanner (the law enforcement officer who sought the warrant), I.R.S. Special Agent Mike Epps, and Magistrate Judge John W. Wilson. In these affidavits, it is represented that: (1) Swanner and Epps presented the magistrate with an application for a search warrant, an affidavit in support of the warrant, and the search warrant itself; (2) the magistrate read the documents, asked questions about the documents, commented upon the facts contained therein, and determined that probable cause did, in fact, exist; (3) the magistrate signed the application for a search warrant and inadvertently dated it October 26, 1995 (the actual date was September 26, 1995); (4) the magistrate inadvertently forgot to sign and date the search warrant itself; and (5) the magistrate answered affirmatively when asked by Swanner whether all the necessary steps for securing the warrant had been taken.

to the warrant." *Id.* at 922-23. However, the Court in *Leon* made clear that an officer's reliance on the technical sufficiency of the warrant not only must be made in good faith, but also must be objectively reasonable. The *Leon* Court noted that in some circumstances the officer will have no reasonable grounds for believing that a warrant is valid – *e.g.*, when the warrant is facially deficient in particularizing the place to be searched or the things to be seized.[5] *Id.* at 923, 104 S.Ct. at 3420-21. On this basis, Victor Kelley and Wright argue that the unsigned and undated warrant in this case was facially deficient such that the officers could not have relied on it in an objectively reasonable way. We disagree with Kelley and Wright's reasoning.

In *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984), the Supreme Court considered a defendant's argument that a warrant authorizing a search for "controlled substances" violated the Fourth

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[5] The instant case involves an officer's reliance on a warrant that was technically insufficient, *i.e.*, one without a signature or a date. In *Leon*, the Court was confronted with an officer's reliance on a warrant that did not support the magistrate judge's probable-cause determination. The Court found the good-faith exception to the exclusionary rule to be applicable because the officers were not "dishonest or reckless in preparing their affidavit" and (based on the facts of the case) "could have harbored an objectively reasonable belief in the existence of probable cause." In the instant case, it is undisputed that probable cause to search Kelley's home existed. Therefore, *Leon*, although it provides the starting point for our analysis, is factually distinguishable from the instant matter.

Amendment's particularity requirement.[6] *Id.* at 987, 104 S.Ct. at 3427. A detailed affidavit accompanying the challenged warrant indicated that the search was for items related to a homicide investigation. *Id.* at 985, 104 S.Ct. at 3426. It was undisputed that the issuing magistrate and the executing officers knew the contents of the affidavit and the focus of the search. Relying on *Leon*, the Court noted that the only issue before it was "whether the officers reasonably believed that the search they conducted was authorized by a valid warrant." *Id.* at 988, 104 S.Ct. at 3427. The Court concluded that the officers' good-faith reliance on the warrant was objectively reasonable because the affidavit had been approved by the U.S. Attorney, the issuing magistrate had made a probable cause determination, and the warrant would have been valid on its face with only minor corrections. *Id.* at 989, 104 S.Ct. at 3428.

Likewise, in *United States v. Beaumont*, 972 F.2d 553, 562 (5th Cir. 1992), we applied the good-faith exception to uphold the admissibility of evidence seized during a search, despite the fact that the warrant authorizing the search failed the particularity requirement. Relying on the Supreme Court's instruction as well as this circuit's subsequent analysis, we concluded that the officers' good-faith reliance on the warrant was objectively reasonable because "there was a probable cause determination made by [a] judge, the affidavit provided specific information of the objects of the search, the executing

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[6] A warrant that does not satisfy the particularity requirement is akin to a warrant that is unsigned and undated. Both violations are technical in nature.

officer was the affiant, the additional officers making the search knew what was to be searched for, and, finally, the warrant could easily have been made valid with the insertion of the phrase 'see attached affidavit.' " *United States v. Shugart*, 117 F.3d 838, 845-46 (5th Cir. 1997) (offering an analysis of both *Sheppard* and *Beaumont*).

Guided once again by the Supreme Court's *Sheppard* analysis, we find that the evidence in the instant case was properly admitted because the police conduct was objectively reasonable and largely error-free, and that it was the judge and not the police officers who made the mistake. *See Sheppard*, 468 U.S. at 990-91, 104 S.Ct. at 3428-29. Further, we find that the officers in this case took every step that could reasonably be expected of them. On this point, the words of the *Sheppard* Court are again instructive: "we refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Id.* at 989-90, 104 S.Ct. at 3428-29. In this specific circumstance – albeit a narrow one – we find that the meaning behind the function of dating and signing the warrant was not lost. Because the objective criteria for the search warrant – probable cause – existed and the warrant was flawed only due to the inadvertence of the magistrate, we hold that the good-faith exception to the exclusionary rule applies.

In reaching our determination that the good-faith exception to the exclusionary rule applies in this instance, we in no way intend to undercut the importance of both the substantive and ministerial requirements of the Fourth Amendment. We heed the wisdom of the Supreme Court when it advised that:

> The good-faith exception for searches conducted pursuant to warrants is not intended to signal our unwillingness strictly to enforce the requirements of the Fourth Amendment, and we do not believe that it will have this effect. As we have already suggested, the good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time. *Anderson v. Creighton*, 483 U.S. 635, 663 n. 19, 107 S.Ct. 3034, 3051 n. 19 (1987) (quoting *United States v. Leon*, 468 U.S. 897, 924, 104 S.Ct. 3405, 3421, 82 L.Ed.2d 677 (1984)).

We further note that our holding today does not eviscerate the requirement of case-by-case evaluation of the application of the exclusionary rule recognized by the courts. As the Ninth Circuit stated, "the 'policies behind the exclusionary rule are not absolute and must be evaluated realistically and pragmatically on a case-by-case basis.' " *United States v. Luk*, 859 F.2d 667, 671 (9th Cir. 1988) (quoting *United States v. Vasser*, 648 F.2d 507 at 510 n. 2 (9th Cir. 1980), *cert. denied*, 450 U.S. 928, 101 S.Ct. 1385, 67 L.Ed.2d 360 (1981)); *see, e.g., Leon*, 468 U.S. at 906-07, 104 S.Ct. at 3411-12 (explaining that exclusionary rule is judge-made, not constitutional, and application of suppression sanction must be evaluated in each case).

Kelley and Wright also argue for a per se rule that an unsigned and undated warrant can never suffice, and that any evidence seized pursuant thereto must be suppressed. This court's reasoning in *United States v. Richardson*, 943 F.2d 547 (5th Cir. 1991) is helpful to us in

disposing of this argument. In *Richardson,* despite constitutional infirmity and a technical violation of a criminal rule arising from the magistrate judge's failure to administer the proper oath or affirmation to an attorney before the attorney provided information supporting the warrant, we identified several reasons, equally applicable here, why suppression was unwarranted:

> First, '[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.' *Leon* at 921. The rare occasion when a magistrate accidentally fails to [sign a warrant] cannot be eliminated by suppressing the evidence in that situation. Second, it is unlikely that police will willfully and recklessly attempt to evade [getting a warrant signed]. . . . Third, suppressing the evidence seized in the case will add nothing to protect against an affiant who misrepresents the facts to the magistrate, nor will it encourage officers to take their chances in submitting deliberately or recklessly false information. . . . *Richardson,* 943 F.2d at 550.

Because suppression in this situation would not serve a deterrent purpose, and because probable cause existed and the application for the warrant was signed, we conclude that the district court did not err by failing to apply the exclusionary rule.

II

Sufficiency of Affidavit Supporting the Wiretap

Standard of Review

We review for clear error the district court's decision with respect to a motion to suppress recorded conversations because of deficiencies in an affidavit offered in support of the wiretap authorization. *United States v. Tomblin*, 46 F.3d 1369, 1376 (5th Cir. 1995).

Discussion

Appellants Victor Kelley, Wright, Elmore and Shaw, asserting a violation of their Fourth Amendment rights, claim that the affidavit upon which the court based its authorization of the wiretap on Wright's phone was insufficient. Specifically, they urge that the supporting affidavit (1) did not properly establish that other investigative techniques were sufficiently exhausted as required by 18 U.S.C. § 2518(1)(c); and (2) contained false statements and misrepresentations that physical surveillance would have been insufficient and would have alerted appellants to the investigation and that CI Townes existed only on the "fringe" of the drug ring.[7]

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[7] Because each of the above-named appellants participated in the complained-of intercepted communications, they meet our standing requirements as articulated in *United States v. Scasino*, 513 F.2d 47 (5th Cir. 1975). In *Scasino*, we interpreted 18 U.S.C. § 2510(11), which provides that an "aggrieved person" may move to suppress the contents of an unlawfully intercepted communication. We held that only "one who participated in the intercepted conversation or on whose premises the conversation occurred" had standing to challenge the fruits of an illegal

Appellants claim that the wiretap affidavit's representation that other investigative techniques were exhausted and that physical surveillance would be insufficient and destructive to the government's case is belied by the government's assessment that the drug ring was "large" – so "large" in fact that it was responsible for the transportation of roughly 13 to 15 kilograms of cocaine into Monroe (from Houston and Las Vegas) via "female couriers, . . . interstate bus lines, various . . . transport vehicles, and commercial airlines." Appellants suggest that the government "took the easy way out," as is evident by the fact that the only significant physical evidence presented by the government in this case consisted of purported drug transactions between appellants and CI Townes and UCA Andrews. Appellants also contend that the affidavit's assertion that CI Townes was only on the "fringe" of the operation is belied by the fact that CI Townes was a significant part of many of the counts in the indictment.

The government responds that appellants' allegations are conclusory and offer no proof of deliberate falsehood on its part, and that the record indicates that it sufficiently explained to the district court why normal surveillance techniques were impossible in this case. The government claims that surveillance problems arose because of the nature of appellants' neighborhood and the fact that they dealt only with persons they knew well

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wiretap. *Id.* at 50. Our holding was based on the Supreme Court's ruling in *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1968), that the wiretap statute incorporated existing Fourth Amendment standing principles.

and trusted. The government noted that although it was aware that (a) vast quantities of cocaine were coming into Monroe from Houston, Las Vegas, and California and (b) that Kelley's organization was the importer, it (the government) was never able to determine the source and volume of the trade because the organization was almost impenetrable, nor could it engage Kelley himself in any transactions. In sum, the government suggests that the wiretap was a last resort after CI Townes had been discredited by appellants. As for CI Townes, the government claims that the indictment itself is evidence that he was only on the "fringe" of this drug ring, as most of the charges contained therein reference small transactions executed by various appellants and CI Townes. Indeed, the government claims that had Townes been able to engage Victor Kelley in any drug transactions, or had he been able to penetrate the inner circle of the organization in any other way, the charges alleged in the indictment would have reflected this.

We find the government's arguments persuasive. Title 18 U.S.C. § 2518(1)(c) requires a showing that "in the particular investigation normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time." *United States v. Krout*, 66 F.3d 1420, 1424-25 (5th Cir. 1995) (internal quotation omitted). The government is not required to prove exhaustion of every conceivable option before a wiretap order can be issued, and a common sense view of statements contained in the application is taken to determine if the statutory "necessity" requirement is satisfied. *United States v. Guerra-Marez*, 928 F.2d 665, 669 (5th Cir. 1991), *cert. denied* 502 U.S. 917 (1991). In *Guerra-Marez*,

faced with circumstances similar to those in the instant case, we upheld an affidavit against § 2518(1)(c) attack and found no deliberate misrepresentations on the part of the government. The court recognized that:

> [T]he government was aware that [the CI's] status as a paid informant would subject her to impeachment, and it was entitled to secure evidence to corroborate the testimony of such a pivotal witness. Although other investigative techniques had been employed, gaps in the government's case were evident. For example, the quantity of heroin obtained through undercover drug buys was too small to prove a large-scale conspiracy. Some members of the ring became conscious of surveillance, frequently eluding the agents or refusing to deal with them. The agents' efforts to identify . . . suppliers were also frustrated by their inability to obtain advance warning of major incoming shipments of drugs. Although [the CI] occasionally witnessed large heroin transactions, such viewings were accidental and uncorroborated. The government could have reasonably concluded that attempting to elicit further information through [the CI] would have aroused the suspicions of other participants, thus endangering both its informant and the investigation.

Id. at 671; *see also Krout*, 66 F.3d at 1424. Likewise, in the instant case, the government was aware that Townes, as a paid informant, would be subject to impeachment at trial. Although Townes was able to engage a few appellants in drug transactions, evidence of a large-scale conspiracy seemed to be eluding the government. Moreover, further attempts by Townes to elicit information were made impossible by the appellants' aroused suspicions. In such

circumstances, the issuance of a wiretap was justified. Therefore, due to the similarities between the instant case and the *Guerra-Marez* and *Krout* cases, and given our stringent standard, we conclude that the district court did not err in denying appellants' motion to suppress the wiretap evidence.

III

Batson Challenges

Standard of Review

Because jury selection is subjective, a determination pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) turns largely on the court's evaluation of the credibility of counsel's explanation. *United States v. Perkins*, 105 F.3d 976, 978 (5th Cir. 1997) (citation omitted). Consequently, the district court's decision on the ultimate question of discriminatory intent is a finding of fact which is accorded great deference. *Id.*

Discussion

Appellants Victor Kelley, Wright, Elmore and Shaw appeal the district court's decision to sustain three of the government's *Batson* challenges to their use of peremptory strikes against white jurors.[8] They allege that the

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[8] The district court sustained the government's *Batson* challenges to the striking of jurors Pipes, Moore, and Blackwelder. The appellants wanted to strike juror Pipes because he had been in the Marine Corps and his demeanor indicated that he would be pro-prosecution; juror Moore because she was not sufficiently interested in the proceeding

defense articulated reasonable, race-neutral reasons for striking these jurors, and that the government did not prove purposeful discrimination. These appellants also appeal the district court's decision to deny four of their *Batson* challenges to the government's use of peremptory strikes against African-American jurors.[9] They insist that the government did not articulate reasonable race-neutral reasons for striking these jurors, and that they proved purposeful discrimination on the government's part. *See United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (5th Cir. 1993) (setting forth three-step process for resolving *Batson* challenges).

Having reviewed the record, we find no error in the trial court's ruling with respect to either its decision to sustain the government's challenges to the defense's use of peremptory strikes or to deny the defense's challenges to the government's use of strikes. The *Bentley-Smith* court noted that:

> The district court's determination that a party has used peremptory strikes in a discriminatory

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(due to her "preoccupation" with a wedding she had to attend during one of the weekends of the trial); and juror Blackwelder because he (a) did not appear to be fair and impartial and (b) he knew another potential juror.

[9] Alleging that the following reasons were race-neutral, the government struck: (1) juror Jones because she glared at the prosecution and attempted to read their notes; (2) juror Rambo because she suffered from a nervous condition and sat in the back row with her head in her hands; (3) juror Echols because she was working at Wal-Mart and would suffer a financial burden if called to serve (as her husband was unemployed); and (4) juror Kelly because she was a young mother who lived with her parents and had the last name "Kelly."

> manner is a finding of fact and thus cannot be overturned by this Court absent clear error. *Hernandez v. New York*, ___ U.S. ___, ___, 111 S.Ct. 1859, 1871, 114 L.Ed.2d 395 (1991). The district court's determination is entitled to great deference, since findings in this context largely turn on an evaluation of the credibility or demeanor of the attorney who exercises the challenge. *Id.* at 1372-73.

The record in this case does not support the contention that the district court committed reversible error. The district court's finding that defendants' strikes presented a prima facie case of racial discrimination was not clearly erroneous. In response to a *Batson* challenge, "all that a prosecutor need offer is a facially valid explanation." *United States v. Krout*, 66 F.3d 1420, 1428 (5th Cir. 1995) (citing *Purkett v. Elem*, 514 U.S. 765, 767-68, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995)). "Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Krout*, 66 F.3d at 1429 (internal quotation and citation omitted). "Accordingly, a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* In the instant case, the prosecutor articulated specific conduct on the part of the potential jurors which the district court found legitimate. We do not intend to disturb such a finding.

IV

Sufficiency of the Evidence

Standard of Review

To convict each of the appellants of drug conspiracy, the government must prove the existence of an agreement to violate the narcotics laws, the appellant's knowledge of the agreement, and the appellant's voluntary participation in the agreement. *United States v. Gonzalez*, 76 F.3d 1339, 1346 (5th Cir. 1996). A jury may infer the elements of a conspiracy conviction from circumstantial evidence: "An agreement to violate narcotics laws may be inferred from concert of action." *United States v. Cardenas*, 9 F.3d 1139 (5th Cir. 1993). "Knowledge of the conspiracy may be inferred from a collection of circumstances." *Id.* In evaluating a sufficiency of the evidence claim, we must view the evidence and the inferences therefrom in the light most favorable to the jury's verdict and determine whether a rational trier of fact could have found these defendants guilty beyond a reasonable doubt. In addition, "determining the weight and credibility of the evidence is within the sole province of the jury." *United States v. Garza*, 990 F.2d 171, 173 (5th Cir. 1993). We "will not supplant the jury's determination of credibility with that of [our] own." *Id.*

Discussion

Each of the appellants argues that there was insufficient evidence to support the jury's determination that he was a member of a drug conspiracy. In addition, appellants Wright, Elmore, Shaw, and Parnell Kelley argue that

there was insufficient evidence to support their drug distribution convictions.

Appellants Wright, Elmore, and Shaw concede that undercover agent Andrews' testimony established that they were involved in several drug transactions. The jury is entitled to believe a witness unless the testimony is so incredible that it defies physical laws. *United States v. Lerma*, 657 F.2d 786, 789 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). As the jury was within its province to credit her testimony, appellants' sufficiency arguments with respect to the drug distribution charges must fail.

Turning to the conspiracy convictions, each appellant asserts as the primary basis for the insufficiency of evidence the claimed lack of credibility of CI Townes. Specifically the appellants assert that his testimony was patently unbelievable and incredible because of his: (1) considerable prior criminal history; (2) status as a paid informant; (3) continued drug activity while operating as a CI; and (4) inconsistent testimony pertaining to (a) his motivation for becoming a CI and (b) his marital status and support of his children. In addition, appellants assert that (1) none of the wiretap evidence was of an incriminating nature and (2) the evidence seized from Victor Kelley's home (the drug ledger page and cash) was not sufficiently connected to them primarily because the government's experts could not verify that Victor Kelley's handwriting appeared on the drug ledger.

Appellants' argument with respect to the "patently unbelievable" nature of CI Townes' testimony is easily rejected. We have previously held that "a guilty verdict

may be sustained if supported only by the uncorroborated testimony of a coconspirator, even if the witness is interested due to a plea bargain or promise of leniency, unless the testimony is incredible or insubstantial on its face." *United States v. Bermea*, 30 F.3d 1539, 1552 (5th Cir. 1994), *cert. denied*, 514 U.S. 1097 (1995). "Testimony is incredible as a matter of law only if it relates to facts that the witness could not possibly have observed or to events which could not have occurred under the laws of nature." *Id.* Although Townes was not a coconspirator, there is no contention by appellants that Townes could not have observed the events he testified to, or that such observation was impossible. As the jury was within its province to credit Townes' testimony concerning the conspiracy charges despite his shortcomings, and his testimony regarding the distribution charges was corroborated by that of undercover agents, appellants' argument against Townes' testimony is meritless.

We are not persuaded by appellants' contention that the wiretap evidence and the evidence seized from Victor Kelley's home were not connected to them. Our review of the record reveals that the wiretap evidence and corroborating testimony of agents indicate that appellants were involved in numerous drug transactions. This evidence fully supports the jury's conclusion that the defendants engaged in a drug distribution conspiracy.

Parnell Kelley alleges that Townes' testimony did not established that he was a member of a conspiracy or that he participated in distribution transactions. We are unpersuaded by this argument. Our examination of the record reveals that the testimony of the undercover agents supports Parnell Kelley's conviction.

V

Outside Influence on the Jury

Standard of Review

We review for abuse of discretion the district court's denial of a motion for new trial alleging extrinsic influence on the jury. *United States v. Jobe*, 101 F.3d 1046, 1058 (5th Cir. 1996). In addition, we acknowledge that "[t]he procedures used to investigate allegations of juror misconduct and the decision as to whether to hold an evidentiary hearing are matters which rest solely within the sound discretion of the district court." *Id.* (citations omitted).

Discussion

Each of the appellants in this case argues that the district court abused its discretion in denying his motion for mistrial, filed after the jury informed the judge that it was hesitant to render a verdict because certain of its members were afraid for their own safety, as well as that of their families. Appellants claim not only that this note evidenced an extrinsic influence on the jury, but that an extrinsic factor – fear itself – was driving their deliberations.

In any trial, there is an initial presumption that the jury is impartial. *Jobe*, 101 F.3d at 1058. As appellants point out, however, this presumption can be defeated through evidence that an extrinsic factual matter actually tainted the jury's deliberations. *Id.* Indeed, once such a showing is made, the defendant enjoys a rebuttable presumption of prejudice – entitling him to a new trial –

unless the government proves the harmlessness of the breach.[10] The district court's investigation of these matters, however, is premised on a colorable showing that an extrinsic influence was actually made on the jury. *Id.* (explaining that a "district court must investigate the asserted impropriety, [and if the results of its inquiry so warrant, grant a new trial], only when a colorable showing of extrinsic influence is made."). Such a showing may be made by *evidence* that extrinsic factual matter tainted the jury's deliberations. *United States v. O'Keefe*, 722 F.2d 1175, 1179 (5th Cir. 1983).

Appellants did not present any evidence to indicate that an outside or extrinsic influence affected the jury. As the government points out, their claims are based on mere speculation. Appellant Elmore's brief states that "[t]his jury fear *had to be created* by a factor outside the confines of the evidence presented at trial for nothing in the record fosters such unusual fear." (emphasis added). Moreover, the government notes that defense counsel's cross-examination of CI Townes – during which Townes stated that he was fearful for his life – was the probable reason for the jury's fear. The government's explanation is certainly plausible. Given the stringent standard that governs our review, and because that there is no evidence of outside influence, we affirm the denial of appellants' motions.

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[10] In determining whether the government carries its burden on the harmlessness issue, the district court is obliged to consider "the content of the extrinsic material, the manner in which it came to the jury's attention, and the weight of the evidence against the defendant." *Id.* (citation omitted).

VI

Sentencing Claims

Standard of Review

While the district court's interpretation of the Sentencing Guidelines is a question of law reviewed de novo, its factual findings under the Guidelines are reviewed only for clear error. *United States v. Reyna*, 130 F.3d 104, 112 (5th Cir. 1997). The district court's calculation of the amount of drugs involved for purposes of sentencing is reviewed for clear error. *United States v. Leal*, 74 F.3d 600, 607 (5th Cir. 1996) (noting that only a preponderance of the evidence must support the district court's determination). In addition, we review for clear error the district court's determination of relevant conduct during sentencing. *United States v. Wilson*, 116 F.3d 1066 (5th Cir. 1997).

The district court's decision to increase a defendant's offense level pursuant to Guidelines § 3B1.1 for his aggravating role in the transaction is a finding of fact that we also review for clear error. *United States v. Narvaez*, 38 F.3d 162, 166 (5th Cir. 1994). There must be an acceptable evidentiary basis for the court's factfindings at the sentencing hearing. *Id.* The district court's findings are not clearly erroneous if they are plausible in light of the record reviewed in its entirety. *Id.*

Discussion

Each of appellants Victor Kelley, Wright, Shaw, and Elmore contends that the district court incorrectly attributed 2,177.65 grams of cocaine base to his offense, instead of the amount with which each was directly connected as

established by the testimony. In sentencing a defendant for participation in a drug conspiracy, the court must make findings with respect to (1) when the defendant joined the conspiracy, (2) what drug quantities were within the scope of the agreement, and (3) what quantities the defendant could reasonably foresee being sold by the conspiracy. *United States v. Wilson*, 116 F.3d 1066, 1076 (5th Cir. 1997). The base offense level under the Guidelines is determined by the quantity of drugs involved in the offense, and this quantity includes both drugs with which the defendant was directly involved, and drugs that can be attributed to the defendant in a conspiracy as part of his "relevant conduct" under the Guidelines. *Leal*, 74 F.3d at 607. Relevant conduct under the Guidelines includes all reasonably foreseeable acts of others in furtherance of the conspiracy. *Wilson*, 116 F.3d at 1076-77 (citation omitted). However, the reasonable foreseeability of all drug sales does not automatically follow from membership in the conspiracy. *Id.* at 1077.

Appellants do not claim that the district court failed to make the required findings, but instead assert that the amount of drugs attributed to their relevant conduct was unreliable because it was based solely on the patently unbelievable and incredible testimony of CI Townes. For this very same reason (*i.e.*, Townes' allegedly unbelievable testimony), Victor Kelley, Wright, and Elmore and Shaw also dispute their designations as leader, manager, and members of a conspiracy, respectively.

For sentencing purposes, the district court may consider any relevant evidence "without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of

reliability to support its probable accuracy." *United States v. Rogers*, 1 F.3d 341, 343 (5th Cir. 1993) (quoting U.S.S.G. § 6A1.3). "More specifically, out-of-court declarations by an *unidentified* informant may be considered where there is good cause for nondisclosure of his identity and there is sufficient corroboration by other means." *Id.* (emphasis added). In *Rogers*, we upheld the district court's reliance on quantity-of-drug information provided by confidential informants, where there was no corroboration of the amounts attributed to the defendant, but the government's investigation corroborated many other details of the drug scheme. *Id.* at 344.

Evaluating this claim under *Rogers*, we conclude that appellants' sentences must stand. Townes, although a government informant, actually testified in court. Therefore, the appellants had the opportunity to cross-examine him on this issue. In addition, Townes' testimony about various drug transactions with several of the appellants is corroborated by undercover agents. Moreover, the wiretap evidence secured by the government implicates these appellants as well. Evidence with a sufficient indicia of reliability was before the district court, and its determinations – both as to quantity of drugs and the appellants' roles in the offense – were not clearly erroneous.

Finally, Victor Kelly, Wright, Elmore and Shaw argue that the disparity between penalties for offenses involving cocaine base ("crack" cocaine) and cocaine hydrochloride ("powder" cocaine) is unconstitutionally vague. They concede, however, that their argument is foreclosed by Fifth Circuit precedent. *See, e.g., United States v. Dukes*, ___ F.3d ___, 1998 WL 177988 *3 (5th Cir. 1998) (noting that the distinction between cocaine base and powder

cocaine is not ambiguous for purposes of a conviction). Based on the well-settled law of this circuit, we decline appellants' invitation to revisit our holding on this issue.

Conclusion

For the foregoing reasons, we deny appellants' claims and AFFIRM the decision of the district court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

UNITED STATES OF AMERICA	CRIMINAL ACTION NO. 95-30024-01/07
VERSUS	JUDGE MELANCON
VICTOR G. KELLEY, ET AL	MAGISTRATE JUDGE SIMON

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

(Filed Jan. 26, 1996)

Before the Court are motions to suppress evidence filed by four of the defendants herein. An evidentiary hearing was held on January 18, 1996, to determine the facts applicable to the motions. Based on the testimony given at the hearing and the arguments of counsel submitted in their respective briefs, I will recommend that all of the motions be denied except the motion of Victor G. Kelley to suppress any physical evidence seized from 151 Sue Drive, Monroe, Louisiana, which I will recommend be granted in part. The reasons for my recommendations are set out below.

Motions of Terry Elmore and James Earl Shaw

On December 13, 1995, Terry Elmore and James Earl Shaw filed motions to suppress but did not specify any specific statement or any document or other specific physical evidence that they wanted suppressed. Since there is nothing specific that Elmore and Shaw wish to

have suppressed, I recommend that their motions be denied as moot.

Welton L. Wright

Wright sought to suppress any conversations overheard by government agents by means of wiretapping or other means of electronic surveillance, and any physical evidence seized from 3804 Curry Street in Monroe. At the hearing it was determined that no physical evidence had been seized from 3804 Curry Street, so that part of Kelley's motion should be denied as moot. The reasons for denying suppression of the wiretap evidence will be discussed below.

Motion of Victor G. Kelley

Kelley moved to suppress four specific types of evidence, (1) any handwriting exemplars of Victor Kelley and co-defendant Angela Turner, (2) statements made by Kelley or co-defendant to any government agent, (3) evidence obtained by wiretap or other means of electronic surveillance, and (4) physical evidence seized from 151 Sue Drive, Monroe, Louisiana.

No. 1: Handwriting Exemplars

Kelley contends that requiring Kelley, and his co-defendant Angela Turner, to give handwriting samples was a violation of their Fifth Amendment right against self-incrimination, contending that the samples were communicative in nature and should be suppressed.

However, Kelley has not submitted any authority in support of his contention.

The government has submitted the case of *Gilbert v. State of California*, 388 U.S. 263, 266, 87 S.Ct. 1951, 1953, 18 L.Ed.2d 1178, 1182 (1967) in which the Supreme Court held that a handwriting exemplar, in contrast to the content of what is written, like the voice or the body itself, is an identifying characteristic outside the protection of the Fifth Amendment.

The government sought the handwriting samples to try to determine if they were the same handwriting as was found on a piece of notebook paper that was seized at Turner's and Kelley's residence that contained handwriting of names and numbers which the government contends is a summary of drug transactions (Govt. Ex. 3). The FBI agents who obtained the handwriting samples required Kelley and Turner to write the exact names and numbers contained on the notebook page, but did so by putting those names and numbers into different sentences or context.

I find that the government's method of taking handwriting samples from Kelley and Turner did not turn their giving of the samples into self-incrimination of those defendants. The handwriting samples that they gave were still identifying physical characteristics just like the voice or the body itself, regardless of what was written or how it was written out. Therefore, the motion to suppress the handwriting samples should be denied.

No. 2: Statements

Kelley seeks to suppress a statement he made to FBI agent John Tanza in the presence of other persons at Troop F headquarters in Monroe following his arrest on September 28, 1995, and also statements made to the authorities by Angela Turner.

Kelley was arrested at 151 Sue Drive where he was first advised of his rights. At that time Kelley said he understood his rights but he declined to sign an advice of rights form or to waive any rights. However, Kelley never said that he wanted an attorney at that time.

When Kelley got to Troop F headquarters, Agent Tanza explained that Kelley had been arrested on a multiple count indictment for conspiracy to distribute crack cocaine and explained Kelleys rights to him again, and at that time Kelley signed a rights waiver (Govt. Ex. 2) and made the statement which he now seeks to suppress.

Kelley argues that his statement should be suppressed because it was made while he was in custody, and that it was involuntary because of lack of counsel and undue influence. Kelley contends that he did not validly execute a waiver of his rights prior to the custodial interrogation.

The law on the subject can be found in *U.S. v. Ornelas-Rodriguez*, 12 F.3d 1339, 1347 (5th Cir. 1994) which says that to determine the voluntariness of a statement the court must consider the totality of the circumstances and insure that the statement is a product of defendant's free and rational choice; that those things are decided on a case by case basis, and that the government has the

burden of proving by a preponderance of the evidence that the defendant voluntarily waived his rights and that the statement was voluntary. *U.S. v. Rastrepo,* 994 F.2d 173, 183 (5th Cir. 1993) and *U.S. v. Rojas-Martinez,* 968 F.2d 415, 418 (5th Cir. 1992). The government has carried its burden of proof in this case.

All of the evidence shows that the statement that was given by Victor Keiley at Trooop F headquarters was not coerced; it was given voluntarily and without any undue influence being brought to bear on Kelley. This is true for the statements given by Angela Turner as well, which Kelley also seeks to suppress (Govt. Ex. 4). Neither Mr. Kelley nor Ms. Turner had anything said to them that the law would consider to be undue influence or coercion. There is no evidence that the government overreached in the form of direct coercion or subtle psychological persuasion. *U.S. v. Rojas-Martinez, supra* at p. 418. Therefore, Kelley's motion to suppress the statements of Victor Kelley and Angela Turner should be denied.

No. 3: Wiretap Evidence

Kelley and Wright contend that the evidence secured by wiretap investigation should be suppressed on four grounds:

> (1) The affidavit submitted in support of the government's application for wiretapping surveillance contained fatal errors and misrepresentations which render the affidavit insufficient to support the issuance of the order.

(2) Other investigative techniques were not sufficiently exhausted as required by 18 U.S.C. § 2518(1)(c).

(3) The consent of the confidential informant who electronically transmitted conversations during the drug buys on which some information contained in the wiretap affidavit was based may not have been voluntarily and freely given, and

(4) The credibility of the undercover agent who participated in the drug buys, whose information was part of the basis of the affidavit submitted for the wiretap, was unreliable or untrustworthy.

1.

In the recent case of *U.S. v. Guerra-Marez*, 928 F.2d 665 (5th Cir. 1991), a defendant contended that an affidavit submitted in support of an application for wiretaps contained fatal errors and misrepresentations. The court noted that once a defendant makes a "substantial preliminary showing that a false statement knowingly or intentionally, or with reckless disregard for the truth," was included in the affidavit, the defendant is entitled to a hearing to contest the validity of the warrant. The court held that if any offending statements are found to have been in the affidavit, they must then be stricken from the affidavit, and the search warrant can be validated only if the reconstructed affidavit satisfies the probable cause requirement.

In the case at bar, the movants have failed to make any showing at all that there was any false statement in

the wiretap affidavit, much less that any false statement was knowingly or intentionally made in the wiretap affidavit. All of the testimony at the hearing has corroborated the information in the wiretap affidavit (Govt. Ex. G1).

The movants contend that the statements in Paragraphs 57-61 of the affidavit, that the confidential informant exists only on the "fringe" of the purported drug operation, is a false statement. However, the testimony shows it to be a truthful statement. The evidence shows that although the confidential informant made a few drug buys, he had minimal if no contact with Victor G. Kelley and Gerald J. Gallien, who were thought to be the heads of the alleged drug trafficking organization when the wiretap was sought, and that the confidential informant had no contact with suppliers located in other states and had been unable to find out where the money and crack cocaine was stashed.

2.

The *Guerra-Marez* case also discusses the second point of the movants' motion to suppress the wiretap evidence. It states that 18 U.S.C. § 2518(1)(c) provides a statutory "necessity requirement" designed to insure that "wiretapping is not resorted to in a situation in which traditional investigative techniques will suffice to expose the crime." The court goes on to say that courts are reluctant to impose their hindsight upon law enforcement agencies, and the proponent of the application need not establish that "every other imaginable mode of investigation would be unsuccessful."

The evidence in the case at bar indicates that other types of investigations had been tried prior to seeking authority for the wiretap, and that those investigations had been unsuccessful in linking Victor Kelley with a conspiracy, and that there was good reason for not trying the previously tried methods again. This is all explained in detail in Paragraphs 50 through 69 of the wiretap affidavit.

At the time that authorization for the wiretap was requested, the government was trying to find proof that Victor G. Kelley was one of the leaders of the conspiracy, and the government rightly felt that they could not prove the conspiracy itself, or Mr. Kelley's involvement in it, with the types of investigation that they had been doing up to that time.

The confidential informant, Mario Townes, had simply been able to make a few purchases but had not been able to have any particular contact with Victor Kelley, and the government's undercover agents had not been able to infiltrate the inner workings of the alleged conspiracy due to the close and secretive nature of the network. The affidavit stated that there were no undercover agents who could infiltrate the conspiracy at a level high enough to identify all members of the conspiracy or otherwise satisfy all the goals of the investigation, and I find that the government agents reasonably believed that at the time the affidavit was presented to Judge Melancon.

For the reasons stated above, I find that other investigative techniques had been sufficiently exhausted when the government sought permission for its wiretap.

3 and 4

The movants have failed to put forth any evidence to support their other contentions, that the consent of the confidential informant was not freely given, or that the electronically transmitted conversations between the confidential informant and other persons were not made with the confidential informant's free and voluntary consent. All the evidence shows that all of the activities of the confidential informant, Mario Townes, were with his free and voluntary consent, and that all of the activities of the undercover agent, Ms. Tamara Andrews, were also with her free and voluntary consent. Additionally, I find no reason to question the credibility of Townes or Andrews with regard to their undercover work.

Since the evidence does not support the claims of the movants that the wiretap evidence was obtained through an improper and invalid affidavit, the motion to suppress the wiretap evidence should be denied.

No. 4: Physical Evidence Seized at 151 Sue Drive

The government has advised that the only evidence that was seized at 151 Sue Drive that the government intends to offer at the trial is the previously mentioned notebook page allegedly containing a handwritten summary of drug transactions which was found in the drawer of a nightstand in a bedroom of the residence, and $13,000.00 in U. S. currency which was found in a drawer of a workbench in a building behind the residence. Although the currency is listed in the inventory of objects seized under the search warrant, a consent to search the building where the currency was found was obtained

from Angela Turner at 7:55 a.m. on September 28, 1995, before that outbuilding was searched.

Although the movants did not contend that the search warrant was invalid as to form, the Court noted that although the Magistrate Judge signed the application and affidavit for the search warrant, he did not sign the search warrant, itself, nor is the date or time of issuance, or the city and state of issuance, stated on the warrant (Govt. Ex. 6). The affidavit submitted in support of the application for the warrant is dated September 26, 1995, and was sworn to before the Magistrate Judge at Monroe, Louisiana, on that date.[1]

No evidence was presented concerning why the search warrant was not dated or signed (although an explanation was stated by the Assistant U. S. Attorney after the court noted the omission), and no authority has been presented to the Court to support the government's assertion that property can be validly seized pursuant to an undated and unsigned search warrant, if a Magistrate Judge intended to sign the search warrant but inadvertently failed to do so.

However, it is not necessary to determine whether an undated and unsigned search warrant can be the basis for a valid seizure in this case, because the notebook that was

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[1] Testimony showed that the month stated on the date line of the application for the search warrant was erroneously written as "October," but that the Magistrate Judge actually signed the application on September 26, 1995, the same date that the affiant signed the attached affidavit.

seized, and particularly the page of the notebook in question, was beyond the scope of the property described for seizure in the warrant.

Under the Fourth Amendment, no warrants shall issue except those "particularly describing the . . . things to be seized." The constitutional requirement of particularity seeks to prevent general exploratory rummaging and seeks to insure that the executing officer is able to distinguish between those items which are to be seized and those which are not. *U.S. v. Hill*, 19 F.3d 984 (5th Cir. 1994).

To satisfy the particularity requirement, the warrant must "be sufficiently definite so that the officer executing it can identify the property sought with reasonable certainty." In identifying the property to be seized, the agents are "required to interpret the warrant," but are "not obliged to interpret it narrowly." Stated differently, the particularity requirement requires the search warrant to describe the property to be seized with reasonable specificity, but not with elaborate detail. *Hill, supra* at p. 987. Thus, evidence seized pursuant to a search warrant is not necessarily suppressible merely because the "nomenclature assigned to these items by the defendant might differ from the description contained in the warrant." "[T]he question whether the evidence seized falls within the scope of the warrant ultimately turns on the substance of the item seized 'and not the label assigned to it by the defendant.' " *Id.* at 987-988.

The testimony of IRS agent Kenneth Swanner who submitted the application and affidavit for the search warrant, and the affidavit itself, show that Swanner was

in charge of investigating the money laundering count in this case, which involved the purchase of the residence at 151 Sue Drive with cash that was allegedly structured into cashier's checks and money orders which were used to actually pay for the house. The testimony and the affidavit show that Swanner did not intend to search for drugs or evidence of drug distribution, but only for evidence to support a money laundering count.[2]

The notebook page in question is clearly not includable within the descriptions in items 2, 3 or 4 in the list of property to be seized. Items 2 and 4 specifically describe only financial documents and records relating to the acquisition, ownership and maintenance of 151 Sue Drive, and Item 3 relates strictly to income tax returns and their supporting papers. The only possible description of the notebook page in question would have to be found in Item 1 which reads as follows:

> "Any and all books, records, notes, receipts, etc. relating to the acquisition of assets and disbursements of currency with laundered funds."

The notebook page in question allegedly relates to the purchase or sale of drugs. The purchase and sale of drugs can hardly be said to concern the acquisition of assets or disbursements of currency "with laundered funds." Neither the cash used to purchase drugs nor the drugs themselves could be "laundered funds."

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[2] The application for the search warrant does not state the title or section of the U. S. Code or a description of the alleged offense for which the search was expected to produce evidence, but Paragraph 3 of the affidavit alleges that Angela Turner violated Title 31, United States Code, Section 5324(3).

Since the page of the notebook in question does not fall within the description of the property to be seized that was attached to the search warrant, the use of the notebook page as evidence at the trial should be suppressed.

On the other hand, the $13,000.00 in currency should not be suppressed because it was seized pursuant to a valid consent to search that was executed by Angela Turner. Kelley argues that the government did not establish that Turner exercised control over the premises where the cash was found, or, if she did, whether she validly and consensually executed the consent to search form. However, I find from the evidence that Angela Turner was using the premises at 151 Sue Drive in Monroe, Louisiana, as her residence at the time of the search and for a period of time prior thereto, and that she validly and consensually executed the consent to search form (Govt. Ex. 5).

The Fourth Amendment's prohibition to a warrantless search does not apply to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S.Ct. 2793, 2797, 111 L.Ed.2d 148 (1990). The term "common authority" means, "mutual use of the property by persons generally having joint access or control for most purposes. . . . " *United States v. Matlock*, 415 U.S. 164, 172 n. 7, 94 S.Ct. 988, 993 n. 7, 39 L.Ed.2d 242 (1974).

Because Turner was a primary resident at 151 Sue Drive, she had the authority to consent to the agents

searching the home and its outbuildings. In *Rodriguez*, the Supreme Court held that the agents must only have a reasonable belief that the person who consented to their entry is the resident of the premises, even if they are not. *Rodriguez* at p. 2800. The evidence in this case shows that the agents had more than a reasonable belief that Turner was a primary resident. They had contacted her at the residence previously in order to get a photo pursuant to a Grand Jury subpoena, and the agents had been told by friends of Turner that she resided there. Her children were living there with her, and she was in her night clothes when she came to the door to let the agents in on the morning of the seizure.

The consent to search was signed by Turner after the search of the dwelling house at 151 Sue Drive pursuant to the search warrant had been substantially completed. There is no evidence that the consent to search was executed before the notebook page in question was found, and the agents testified that the only reason for obtaining the consent was to be certain they could validly search the outbuildings and vehicles on the premises. In fact, Mrs. Turner's mother, who had come to take care of her children, persuaded Ms. Turner to have the agents understand that the mother's car was specifically excluded from the consent to search.

Because the $13,000.00 in currency was validly seized pursuant to a valid consent, the motion to suppress the seizure of the $13,000.00 in cash should be denied.

Conclusion

For the foregoing reasons, IT IS RECOMMENDED that the motions to suppress filed on behalf of Victor G. Kelley, Welton L. Wright, Terry Elmore and James Earl Shaw be DENIED, except for the motion of Victor G. Kelley to suppress the notebook page that was found at 151 Sue Drive, and IT IS RECOMMENDED that the motion to suppress that document be GRANTED.

Under the provisions of 28 U.S.C. § 636(b)(1)(C), the parties have ten (10) business days from service of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge before he makes a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this 26th day of January, 1996.

/s/ John F. Simon
JOHN F. SIMON
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

United States of America	Criminal Action No. 3:95-30024
versus	
Victor G. Kelley, et al	Judge Tucker L. Melancon
	Magistrate Judge John F. Simon

MEMORANDUM RULING AND ORDER

(Filed Apr. 17, 1996)

Before the Court is a motion for reconsideration filed by the United States of America. The motion requests that the Court reconsider a previous order granting a motion to suppress certain evidence seized pursuant to a search warrant. After review of the present state of the law and the facts of this case, the Court finds it necessary to grant the motion and reverse its earlier ruling.

Factual and Procedural Background

Following an investigation and indictment for numerous drug trafficking offenses several individuals were arrested. At the time of their arrest a search warrant was executed at the residence of defendant Victor G. Kelley. As a result of the search several pieces of potential evidence was seized. One of the items was a notebook page containing notations the searching officers believed to be records of drug transactions.

Defendant Kelley moved to suppress the items seized from the house. The United States responded that of all the evidence seized from that location it intended to only offer the notebook page at trial.

The Magistrate Judge issued a Report and Recommendation to the District Court which recommended that the motion to suppress the notebook page be granted. He noted *sua sponte* that the warrant had not been signed and raised a question as to the validity of a warrant in such a posture. The Magistrate Judge did not decide the signature issue, however, as he found the search violated the Fourth Amendment on different grounds, particularly, that the seizure of the notebook page exceeded the scope of the search warrant.

The District Court issued an order concurring with the recommendation of the Magistrate Judge and granting the motion to suppress. The District Court, however, found it necessary to grant the motion for different reasons than those suggested by the Magistrate Judge.

The District Court subsequently gave oral reasons for the order granting the motion to suppress. The Court found that the notebook page was properly seized pursuant to the plain view doctrine, but found that the document should be suppressed because the warrant was not signed or dated by the Magistrate Judge.[1] The Court held that this flaw rendered the warrant invalid as a matter of law. The Court also found that the absence of a

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[1] The United States Magistrate Judge who considered the motion to suppress was a different Magistrate Judge than the one who issued the search warrant.

signature on the warrant was of such a fundamental nature that the "good faith" exception to the exclusionary rule did not apply.

The United States of America then filed the present motion to reconsider. Attached to the motion was an affidavit of the Magistrate Judge who stated that he reviewed the application for the warrant, the affidavits accompanying it, found that there was probable cause to issue the warrant, intended to issue the warrant, but had inadvertently failed to sign the warrant. Defendant Victor G. Kelley filed a response to the motion and a hearing on the merits was held at which the other defendants were invited to participate.

The Analysis

In establishing the "good faith" exception to the exclusionary rule the United States Supreme Court stated that

> [i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate *only* if the officers were dishonest or reckless in preparing their affidavit *or* could not have harbored an objectively reasonable belief in the existence of probable cause.

United States v. Leon, 468 U.S. 897, 926, 104 S.Ct. 3405, 3422 (1984) (emphasis added). Attached to the motion to reconsider are affidavits from the officers who obtained the warrant and the Magistrate Judge who issued it. These affidavits establish that the officers met with the Magistrate Judge, answered questions he had about the

application for the warrant, that the Magistrate Judge signed the application, read the documents, found that probable cause existed, and inadvertently failed to sign and date the warrant itself.

The exclusionary rule is designed to deter police misconduct and should be applied "only on a case-by-case basis and only in those unusual cases in which a grant of suppression will further the purposes of the rule." *United States v. Richardson*, 943 F.2d 547, 551 (5th Cir. 1991). The evidence contained in the affidavits place the actions of the officers outside the scope of the exclusionary rule and, to the extent it does not (i.e., the absence of a valid warrant), demonstrates that the *Leon* exception to the rule as interpreted by the United States Court of Appeals for the Fifth Circuit in *Richardson* applies.

It also may be argued that suppression in this instance would encourage officers obtaining a warrant to scrutinize each detail of the warrant and point out suspected errors to the issuing judge. This suggestion, however, has been rejected as "speculative" by the Supreme Court. *Leon*, 486 U.S. at 918, 104 S.Ct. at 3418. Further, in *Richardson* the United States Court of Appeals for the Fifth Circuit took *Leon* a step further and found that "the rare occasion when a magistrate accidentally fails to administer an oath cannot be eliminated by suppressing the evidence in that situation." *Richardson*, 943 F.2d at 551.

This Court finds the analysis of *Richardson* applies to this case and dictates the result:

> The Fourth Amendment exclusionary rule "operates as a *'judicially created remedy'* designed to safeguard Fourth Amendment rights *generally* through its deterrent effect, rather than a *personal constitutional right* of the party aggrieved . . . A court should exclude evidence obtained while executing a subsequently invalidated warrant "only on a case-by-case basis and only in those unusual cases in which a grant of suppression will further the purposes of the rule.

Richardson, 943 F.2d at 550-51, *citing Leon*, 486 U.S. at 906, 104 S.Ct. at 3412 (emphasis added). In this case, "[p]enalizing the [agents] for the magistrate's error, [even if that error was compounded by the failure of the agents to review the warrant after meeting with the Magistrate Judge,] cannot contribute logically to the deterrence of Fourth Amendment violations." *Leon*, 486 U.S. at 921, 104 S.Ct. at 3419. The rare occasion when a Magistrate Judge fails to sign a warrant cannot be eliminated by suppressing the evidence in that situation. *Richardson*, 943 F.2d at 551.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

United States of America	Criminal Action No. 3:95-30024
versus	
Victor G. Kelley, et al	Judge Tucker L. Melancon
	Magistrate Judge John F. Simon

ORDER

(Filed Apr. 17, 1996)

In accordance with the Memorandum Ruling issued today,

IT IS ORDERED that the motion for reconsideration filed by the United States of America be granted and that the motion to suppress filed by defendants be denied in its entirety.

Thus done and signed this 17th day of April, 1996 at Monroe, Louisiana.

/s/ Tucker L. Melancon
Tucker L. Melancon
United States
District Judge

ROBERT H. SHEMWELL, CLERK
USDC, WESTERN DISTRICT OF LA
BY /s/ Illegible Carroll
DATE 9-4-96

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

11:07 am

UNITED STATES OF AMERICA

Criminal No. 95-30024

Versus

VICTOR G. KELLY, et al.

(Filed 9-4-96)

* * *

JURY NOTE

We have members that are afraid for the safety of their family and their own well-being and will not vote on any count for or against.

/s/ Ed Dandridge
JURY FOREPERSON